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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

SKYE ASTIANA,)	
)	
PLAINTIFF,)	NO. C-C-10-4387 PJH
)	
VS.)	WEDNESDAY, SEPTEMBER 12, 2012
)	
BEN & JERRY'S HOMEMADE,)	OAKLAND, CALIFORNIA
INC.,)	
)	
DEFENDANT.)	
)	
CHANEE THURSTON, ET AL.)	
)	
PLAINTIFFS,)	
)	
VS.)	C-10-4937 PJH
)	
CONOPCO, INC.,)	
)	
DEFENDANT.)	
)	
ROSS CORRIETTE, ET AL.,)	
)	
PLAINTIFFS,)	
)	
VS.)	C-11-1811 PJH
)	
UNILEVER,)	
)	
DEFENDANT.)	
)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(APPEARANCES ON NEXT PAGE.)

REPORTED BY:

DIANE E. SKILLMAN, CSR 4909, RPR, FCRR
OFFICIAL COURT REPORTER

1
2 **APPEARANCES:**

3 **FOR PLAINTIFFS**

4 ASTIANA & THURSTON: BRAUN LAW GROUP, P.C.
5 10680 W. PICO BLVD. SUITE 280
6 LOS ANGELES, CALIFORNIA 90064
7 BY: MICHAEL D. BRAUN, ESQUIRE

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LAW OFFICES OF JANET LINDNER SPIELBERG
12400 WILSHIRE BOULEVARD, SUITE 400

LOS ANGELES, CALIFORNIA 90025
BY: JANET LINDER SPIELBERG, ESQUIRE

10 FOR PLAINTIFF
11 CORRIETTE:

12 GARDY & NOTIS, LLP
13 560 SYLVAN AVENUE
14 ENGLEWOOD CLIFFS, NEW JERSEY 07632
15 BY: KELLY A. NOTO, ESQUIRE

16 FOR DEFENDANT:

17 MORRISON & FOERSTER
18 425 MARKET STREET
19 SAN FRANCISCO, CALIFORNIA 94105
20 BY: LISA WONGCHENKO, ESQUIRE
21 WILLIAM L. STERN, ESQUIRE

1 WEDNESDAY, SEPTEMBER 12, 2012

10:40 A.M.

2 P R O C E E D I N G S

3 **THE CLERK:** CALLING RELATED CIVIL CASE NUMBER 10-4387
4 ASTIANA VERSUS BEN & JERRY'S, 10-4937 THURSTON VERSUS CONOPCO
5 AND 11-1811 CORRIETTE VERSUS UNILEVER.

6 **MR. BRAUN:** GOOD MORNING, YOUR HONOR.

7 MICHAEL BRAUN ON BEHALF OF ASTIANA, THURSTON, CLARK, THE
8 NAMED PLAINTIFFS AND THE PUTATIVE SETTLEMENT CLASS.

9 **THE COURT:** GOOD MORNING.

10 **MS. SPIELBERG:** GOOD MORNING, YOUR HONOR.

11 JANET SPIELBERG ON BEHALF OF PLAINTIFF ASTIANA, THURSTON
12 AND CLARK AND THE PROPOSED SETTLEMENT CLASS.

13 **THE COURT:** GOOD MORNING.

14 **MS. NOTO:** GOOD MORNING. KELLY NOTO ON BEHALF OF
15 PLAINTIFFS CORRIETTE AND WALDRON.

16 **MS. WONGCHENKO:** GOOD MORNING, YOUR HONOR.

17 LISA WONGCHENKO ON BEHALF OF DEFENDANTS CONOPCO, UNILEVER
18 AND BEN & JERRY'S. AND WITH ME IS WILL STERN ON BEHALF OF THE
19 SAME.

20 **THE COURT:** ALL RIGHT. I DON'T BELIEVE ANY OF YOU
21 WERE HERE ON TIME AND DIDN'T CHECK IN. SO PLEASE BE SURE
22 BEFORE YOU LEAVE THAT YOU LEAVE YOUR BUSINESS CARD WITH THE
23 COURTROOM DEPUTY.

24 ALL RIGHT. I DON'T EVEN KNOW WHERE TO BEGIN WITH THIS
25 THERE ARE SO MANY PROBLEMS AND ISSUES.

I'D FIRST LIKE TO INQUIRE WHETHER OR NOT THERE ARE ANY
OBJECTORS HERE FOR THIS CLASS SETTLEMENT?

I RECEIVED ONE FORMAL OBJECTION WHICH I HAVE CONSIDERED AND I BELIEVE THAT I WAS ADVISED BY THAT OBJECTION THAT THEY INTENDED ON APPEARING, BUT I WANTED TO MAKE SURE THAT WE GIVE THEM AN OPPORTUNITY TO PARTICIPATE.

ANY OBJECTORS TO THIS CLASS ACTION SETTLEMENT PRESENT?

(NO RESPONSE.)

DOESN'T APPEAR TO BE, ALL RIGHT.

NONETHELESS, I REVIEWED THE OBJECTIONS AND HAVE QUESTIONS OF MY OWN IN ADDITION TO THOSE THAT WERE RAISED.

DO EITHER OF YOU HAVE A STATEMENT YOU WOULD LIKE TO MAKE
BEFORE I GET STARTED?

MR. BRAUN: FROM THE PLAINTIFFS' PERSPECTIVE, YOUR HONOR, WE WOULD JUST LIKE TO HEAR YOUR QUESTIONS AND TRY TO ADDRESS THEM AS EFFICIENTLY AS POSSIBLE.

THE COURT: WELL, I HAVEN'T RECEIVED AN UPDATE. THE DECLARATION WITH REGARD TO THE RESPONSE OF THE CLASS IS FROM THE END OF JULY.

SO -- LET ME RECAP AND YOU TELL ME IF I HAVE GOT THE FACTS CORRECT. I LOOKED AT ALL YOUR PAPERS, BUT THERE ARE LOTS OF ISSUES AND PROBLEMS THAT JUMP OUT AT ME.

ALL RIGHT. SO THE SETTLEMENT THAT YOU HAVE AGREED TO WITH REGARD TO THE ASTIANA CASE IS \$5 MILLION AND WITH REGARD TO THE THURSTON, CORRIETTE CASES IT'S TWO AND A HALF MILLION

1 DOLLARS, FOR A TOTAL OF SEVEN AND A HALF MILLION DOLLARS.

2 THAT'S HOW MUCH.

3 **MR. BRAUN:** CORRECT.

4 **THE COURT:** YOU'VE INDICATED THAT THE NOTICE WAS
5 DISSEMINATED TO MILLIONS OF PEOPLE AND IN RESPONSE YOU GET
6 1800 CLAIMS, 1804.

7 CORRECT?

8 **MR. BRAUN:** AND WE DO HAVE AN UPDATE FOR YOU, YOUR
9 HONOR.

10 **THE COURT:** HAVE THERE BEEN MORE CLAIMS?

11 **MR. BRAUN:** YEAH. THERE HAVE BEEN A TOTAL OF 5,466
12 CLAIMS TO DATE.

13 **THE COURT:** 5,466 CLAIMS.

14 OKAY. NOW I HAVE QUESTIONS ABOUT THE NOTICE AND ABOUT THE
15 TYPE OF CLAIMS MADE. STARTING FIRST WITH THE NOTICE.

16 YOU SAY THROUGHOUT THE PAPERS THAT THE NOTICE REACHED --
17 WELL, IN ONE INSTANCE THE NUMBER WAS SET AT 40 MILLION PEOPLE
18 RECEIVED NOTICE. IN OTHER REFERENCES IN THE PAPERS IT IS JUST
19 MILLIONS OF PEOPLE. HOW DO YOU KNOW? HOW DOES ANYONE KNOW?

20 AS I UNDERSTAND IT, THE NOTICES WERE MAILED -- I AM SORRY,
21 WERE DIRECT MAIL BUT ONLY TO KNOWN CLASS MEMBERS. AND I DON'T
22 EVEN REMEMBER HOW YOU MADE THAT DETERMINATION, BUT I VAGUELY
23 RECALL SOMETHING AT THE HEARING ABOUT PEOPLE MAKING CONTACT
24 WITH UNILEVER AND YOU ALL KEEPING TRACK OF WHO THOSE PEOPLE
25 ARE.

1 AND THERE WERE -- THOSE PEOPLE RECEIVED DIRECT MAIL OR
2 E-MAIL.

3 THERE WERE PUBLICATION IN FOUR MAGAZINES WHERE THE
4 DEFENDANTS' PRODUCTS ARE ADVERTISED, AND THERE WAS SOME
5 INTERNET BROADCASTS.

6 HOW DO YOU HAVE ANY WAY OF KNOWING HOW MANY PEOPLE
7 RECEIVED NOTICE OF THIS CLASS ACTION SETTLEMENT?

8 **MR. BRAUN:** WELL, IF I MAY. YOU RAISE A GOOD POINT,
9 YOUR HONOR.

10 WHEN YOU PUT OUT PUBLICATION NOTICE, THE NUMBERS ARE BASED
11 ON CIRCULATION RATES. FOR EXAMPLE, WHEN WE PUT OUT PR NEWS
12 WIRE NOTICE, I DIDN'T BOTHER THE COURT WITH TELLING YOU WHAT
13 THE CIRCULATION RATE WAS AMONG ALL THE NEWS SITES THAT PICKED
14 UP THE STORY. IT WAS ASTRONOMICAL. BECAUSE THE TRUTH IS, WE
15 DON'T KNOW WHO IS ACTUALLY READING THE STORIES OR NOT. THAT'S
16 UNFORTUNATELY JUST A PROBLEM WITH PUBLICATION NOTICE. SO THE
17 BEST WE CAN DO IS PROVIDE THE COURT WITH THE CIRCULATION RATES
18 OF THE MAGAZINES AND PROVIDE THE COURT WITH EFFORTS THAT WE
19 TAKE AT DUE PROCESS WHICH IS DISSEMINATING THAT NOTICE.

20 HOW MANY PEOPLE ACTUALLY PICK IT UP AND READ IT? I
21 COULDN'T TELL YOU. AND QUITE FRANKLY, I COULDN'T TELL YOU
22 WHEN I MAIL NOTICE IN CASES WHETHER PEOPLE OPEN THE MAIL OR
23 NOT; ALL I HAVE IS THE RESPONSE RATE.

24 **THE COURT:** SURE. BUT MAIL NOTICE YOU AT LEAST HAD
25 THE IDENTITY OF PEOPLE --

MR. BRAUN: ABSOLUTELY.

(SIMULTANEOUS COLLOQUY.)

MR. BRAUN: I JUST DON'T WANT TO BE DISINGENUOUS --

THE COURT: EXCUSE ME, YOUR HONOR.

WITH MAIL NOTICE, YOU AT LEAST HAVE THE IDENTITY OF PEOPLE TO WHOM YOU HAVE SENT THE NOTICE.

WITH REGARD TO PUBLICATION NOTICE, YOU HAVE THE BASE
NUMBER OF SUBSCRIBERS, CORRECT? BUT YOU HAVE THE IDENTITY OF
THE SUBSCRIBERS?

MR. BRAUN: THE FIRST STATEMENT YOU MENTIONED WAS CORRECT. AND THE SECOND STATEMENT WE DO NOT HAVE THE IDENTITY OF THE SUBSCRIBERS.

THE COURT: ALL RIGHT. SO YOU REALLY DON'T KNOW HOW
MANY PEOPLE RECEIVED NOTICE IN THIS CASE.

MR. BRAUN: WE DON'T KNOW AND I DON'T THINK WE COULD EVER FIGURE THAT OUT.

THE COURT: ALL RIGHT.

THEN WITH REGARD TO THE CLAIMS, YOU TOLD ME 1804. THERE
HAVE BEEN SOME SINCE THEN, 5,466.

ALL RIGHT. NOW THOSE WERE CLAIMS. WERE THOSE CLAIMS FOR THE \$6 THAT THIS LAWSUIT IS GOING TO GIVE EACH OF THESE PEOPLE?

MR. BRAUN: THAT'S CORRECT, YOUR HONOR.

THE COURT: WERE THERE ANY CLAIMS FOR THE \$20 THAT IS PERMISSIBLE IF THEY HAVE SAVED OLD CARTONS OF ICE CREAM OR

1 RECEIPTS?

2 **MR. BRAUN:** I AM UNAWARE OF ANY CLAIMS THAT WERE MADE
3 WITH PROOFS OF PURCHASE.

4 **THE COURT:** SO THERE ARE NO PROOFS OF PURCHASE, SO NO
5 ONE IS GETTING \$20. THE 5,466 PEOPLE ARE ALL GETTING \$6 EACH.

6 **MR. BRAUN:** AND JUST TO BE CLEAR, YOUR HONOR, AS OF
7 THAT JULY 13TH, I WAS UNAWARE OF ANYBODY THAT PUT IN A PROOF
8 OF PURCHASE. I WOULD HAVE TO VERIFY WITH RUST TO MAKE SURE
9 THAT THAT HASN'T CHANGED.

10 AND WITH RESPECT TO THE 500 -- 5,466, THERE MAY BE SOME
11 ISSUES REMAINING WITH PROPER ADMINISTRATIVE PROCEDURE THAT
12 THEY FOLLOW. IN OTHER WORDS, IF YOU DON'T SIGN THE CLAIM FORM
13 OR SOMETHING LIKE THAT, THERE MIGHT BE A FEW CLAIMS THAT THE
14 ADMINISTRATOR WOULD HAVE TO FOLLOW UP ON.

15 SO I JUST WANTED TO BE PERFECTLY CLEAR ABOUT THAT NUMBER.

16 **THE COURT:** THERE ARE 5,466 CLAIMS OF WHICH YOU DON'T
17 REALLY KNOW WHAT NUMBER ARE GOING TO BE PAID?

18 **MR. BRAUN:** THAT'S NOT CORRECT, YOUR HONOR. THERE IS
19 A VERY SMALL HANDFUL, LESS THAN 50, THAT HAVE POTENTIALLY A
20 DEFECT IN THE CLAIM. I AM ASSUMING THAT DEFECT CAN BE CURED.

21 THAT'S VERY TYPICAL FOR ANY ADMINISTRATION PROCESS.
22 PEOPLE FORGET TO SIGN THEIR NAME. PEOPLE DON'T LIST AN
23 ADDRESS, SOMETHING LIKE THAT. THAT CAN HAPPEN.

24 **THE COURT:** SO, IS THE ADMINISTRATOR GOING TO FOLLOW
25 UP TO OBTAIN SIGNATURES OR WHAT HAVE YOU IN ORDER TO PERFECT

1 THE 50 OR SO DEFECTIVE CLAIMS?

2 **MR. BRAUN:** YES.

3 **THE COURT:** ALL RIGHT. SO LET'S ASSUME THEN THAT
4 THERE ARE 5,466 CLAIMS, AND EACH OF THESE PEOPLE GET \$6, HOW
5 MUCH DOES THAT ADD UP TO BE?

6 **MR. BRAUN:** YOU KNOW, YOUR HONOR, I HAVEN'T DONE THE
7 MATH. MAYBE --

8 **THE COURT:** DOES ANYONE HAVE AN IPHONE WITH A
9 CALCULATOR IN THE COURT?

10 PLEASE MULTIPLY 5,466 BY \$6.

11 **MR. BRAUN:** YOUR HONOR IS DOING IT THE OLD FASHION
12 WAY. I DON'T TRUST MY ABILITY.

13 **MS. SPIELBERG:** I'M TURNING ON MY PHONE.

14 **MR. BRAUN:** I WOULDN'T EVEN ATTEMPT TO TRY, YOUR
15 HONOR. I APOLOGIZE I DIDN'T HAVE THAT NUMBER IN ADVANCE.

16 **UNIDENTIFIED SPEAKER:** ALTHOUGH I AM NOT INVOLVED IN
17 THIS, I JUST DID THE MATH AND I COME UP WITH \$32,796.

18 **THE COURT:** THAT'S EXACTLY WHAT I CAME UP WITH. DID
19 YOU HAVE A CALCULATOR?

20 **UNIDENTIFIED SPEAKER:** NO.

21 **THE COURT:** I DID IT MANUALLY AS WELL. THAT'S THE
22 NUMBER I CAME UP WITH, \$32,796. ALL RIGHT.

23 SO THERE'S A SETTLEMENT OF \$7,000,500 (SIC), AND OF THAT
24 \$7,500,000, THE CLASS RECEIVES \$32,796; IS THAT CORRECT?

25 **MR. BRAUN:** THOSE ARE THE CLAIMS TO DATE, YES.

1 **THE COURT:** DO WE EXPECT MORE OR HASN'T THE DEADLINE
2 PASSED FOR SUBMITTING CLAIMS?

3 **MR. BRAUN:** THE DEADLINE HAS PASSED.

4 **THE COURT:** SO THOSE ARE THE CLAIMS THAT WE HAVE AND
5 ALL THAT WE WILL HAVE.

6 OKAY. NOW, THE PROBLEM RAISED BY THE OBJECTORS, AND I
7 AGREE THAT YOU HAVE RESPONDED ADEQUATELY TO SOME OF THEM, BUT
8 I AM A LITTLE CONCERNED ABOUT THE LACK OF CLARITY IN THE
9 SETTLEMENT NOTICE AS TO WHAT'S GOING TO HAPPEN.

10 BECAUSE THIS IS A CASE IN WHICH THE TAIL IS WAGGING THE
11 DOG. IN MOST CASES, AND I HAVE SEVERAL CLASS ACTION
12 SETTLEMENTS ON MY DOCKET EVERY MONTH, AND IN MOST CASES THE
13 BULK OF THE MONEY GOES TO THE PLAINTIFFS, TO THE CLASS, AND
14 THEN TO THE LAWYERS. AND SOMETIMES THE LAWYERS GET MORE THAN
15 THE CLASS, BUT THE CY-PRES FUND THAT IS TO HANDLE THE RESIDUAL
16 OR RESERVES IS TYPICALLY A SMALL PART OF THE OVERALL
17 SETTLEMENT FUND. TYPICALLY.

18 IN THIS CASE, WITH A SEVEN AND A HALF MILLION DOLLAR FUND
19 AND A PAYOUT OF \$32,000, THE OVERWHELMING MAJORITY OF THIS
20 SETTLEMENT GOES TO THE CY-PRES. I HAVE NEVER HEARD OF
21 ANYTHING QUITE SO IMBALANCED AS THIS APPEARS TO BE TO ME.

22 SO WITH REGARD TO WHAT IS HAPPENING WITH THE CY-PRES FUND,
23 IT IS REALLY, REALLY IMPORTANT. I PICKED UP THE SETTLEMENT
24 AGREEMENT AGAIN. OBVIOUSLY WHEN I GAVE PRELIMINARY APPROVAL,
25 I READ IT, I ASKED YOU ALL QUESTIONS AT THE HEARING. I WASN'T

1 SATISFIED WITH THE ANSWERS THAT I GOT, BUT I APPROVED -- GAVE
2 PRELIMINARY APPROVAL ANYWAY AND I THOUGHT IT WOULD ALL COME
3 OUT IN THE WASH AS IT USUALLY DOES.

4 SURE ENOUGH, LOOKING AT THE SETTLEMENT AGREEMENT AGAIN IN
5 CONJUNCTION WITH YOUR PAPERS, I DON'T REALLY EVEN UNDERSTAND
6 WHAT IT IS THAT I AGREED TO, FRANKLY, WHEN I LOOK AT IT AGAIN.

7 WE LOOK AT THE MONETARY RELIEF PORTION. I WOULD LIKE YOU
8 ALL TO PUT THE SETTLEMENT AGREEMENT BEFORE YOU SO YOU CAN
9 REFER TO THE SAME PROVISIONS THAT I AM.

10 AND JUST FOR EASE OF REFERENCE, WE WILL LOOK AT THE
11 ASTIANA SETTLEMENT SEPARATELY FROM THE OTHER. THEY ARE
12 VIRTUALLY IDENTICAL EXCEPT FOR THE AMOUNTS. AND WE LOOK AT
13 SUBSECTION, I THINK IT'S 3C, SETTLEMENT CONSIDERATION MONETARY
14 RELIEF.

15 OKAY. UNILEVER, THE DEFENDANT -- ONE DEFENDANT IN ONE OF
16 THE CASES AND THE PARENT CORPORATION OF THE OTHER TWO
17 DEFENDANTS, CORRECT?

18 **MS. WONGCHENKO:** THAT'S CORRECT.

19 **THE COURT:** WILL ESTABLISH A UNILEVER RESTITUTION
20 FUND OF \$5 MILLION. I ASSUME THE RESTITUTION FUND IS THE
21 SETTLEMENT FUND, CORRECT?

22 **MS. WONGCHENKO:** CORRECT.

23 **THE COURT:** ALL RIGHT. AND THIS -- EXCEPT IT DOESN'T
24 INCLUDE ATTORNEYS' FEES AND COSTS. THERE WILL BE NO
25 REVERSION.

1 **MS . WONGCHENKO:** NONE --

2 **THE COURT:** TO THE DEFENDANT SPECIFICALLY.

3 **MS . WONGCHENKO:** TO THE DEFENDANTS.

4 **THE COURT:** BUT THE AMOUNT NOT PAID AS RESTITUTION
5 WILL BE DONATED TO CHARITY AS FOLLOWS: THROUGH THE UNILEVER
6 FOUNDATION, WHICH IS THE DEFENDANTS' OWN FOUNDATION TO WHICH
7 IT GIVES MONEY, I ASSUME, ON A REGULAR BASIS.

8 **MS . WONGCHENKO:** IT'S A FOUNDATION IN WHICH THE
9 DEFENDANT WORKS WITH CHARITIES TO GIVE DONATIONS.

10 **THE COURT:** BUT IT'S PART OF THE UNILEVER -- UNILEVER
11 IS THE PARENT CORPORATION OF ALL OF THE DEFENDANTS.

12 **MS . WONGCHENKO:** RIGHT.

13 **THE COURT:** AND ITS -- THE FOUNDATION IS UNDER THE
14 UMBRELLA OF UNILEVER CORPORATION, CORRECT?

15 **MS . WONGCHENKO:** CORRECT.

16 **THE COURT:** OKAY. AND THE BEN & JERRY'S FOUNDATION,
17 WHICH IS PROBABLY UNDER THE SAME UMBRELLA?

18 **MS . WONGCHENKO:** CORRECT.

19 **THE COURT:** OKAY. SO THE MONEY IS GOING TO BE
20 DONATED TO CHARITY AS FOLLOWS: THROUGH UNILEVER OR BEN &
21 JERRY'S, OR ANY OTHER AFFILIATED UNILEVER CHARITABLE
22 FOUNDATION. UNILEVER SHALL COMMIT TO DONATING TO THE
23 NOT-FOR-PROFIT CHARITY AND/OR CAUSES OF ITS CHOICE RELATED TO
24 FOOD OR NUTRITION IN THE UNITED STATES.

25 WHAT DOES THAT MEAN, THAT UNILEVER SHALL COMMIT TO

1 DONATING? ISN'T THE \$5 MILLION SUPPOSED TO BE SPENT? WHAT
2 DOES "COMMIT TO DONATING IT" MEAN?

3 **MS. WONGCHENKO:** THAT SIMPLY MEANS THAT UNILEVER WILL
4 SPEND THAT ENTIRE AMOUNT OF MONEY. ANY AMOUNT THAT IS NOT
5 GIVEN DIRECTLY TO THE CLASS MEMBERS THROUGH CLAIMS WILL BE
6 DONATED THROUGH THE CY-PRES PROVISION.

7 **THE COURT:** THEN IT HAS SEVERAL CHARITIES LISTED, NOT
8 AN EXCLUSIVE LIST, CORRECT?

9 **MS. WONGCHENKO:** THAT'S CORRECT.

10 **THE COURT:** A SUM OF UP TO \$5 MILLION OVER A
11 THREE-YEAR PERIOD COMMENCING THE EFFECTIVE DATE -- COMMENCING
12 ON THE EFFECTIVE DATE.

13 WHAT IS THE EFFECTIVE DATE?

14 **MS. WONGCHENKO:** THAT WOULD BE AFTER THE, I BELIEVE
15 IT'S 30 DAYS AFTER THE SETTLEMENT IS APPROVED.

16 **THE COURT:** OKAY. AND WHEN YOU SAY "UP TO
17 \$5 MILLION", DOES THAT JUST ACCOUNT FOR THE AMOUNT THAT'S
18 GOING TO BE TAKEN FROM THE SETTLEMENT FUND IN THE FIRST
19 INSTANCE TO PAY THE CLAIMS?

20 **MS. WONGCHENKO:** EXACTLY, YOUR HONOR.

21 **THE COURT:** SO IN THIS CASE IT WOULD BE -- WELL, JUST
22 LOOKING AT THE ASTIANA SETTLEMENT, \$5 MILLION MINUS WHATEVER
23 THE RATIO OF THE \$32,000 PAYOUT, CORRECT?

24 **MS. WONGCHENKO:** THAT IS CORRECT.

25 **THE COURT:** OKAY.

1 NOW TURNING TO PAGE 13, SUBPARAGRAPH 3, RESIDUAL
2 RESTITUTION DONATION AMOUNT.

3 IT SAYS: "ONCE ALL PROPER SETTLEMENT CLASS MEMBER
4 CLAIMS ARE PAID AND ANY DISPUTES CONCERNING THE
5 VALIDITY OF CLAIMS HAVE BEEN RESOLVED, ANY RESIDUAL
6 RESTITUTION WILL BE CONSIDERED CY-PRES WHICH UNILEVER
7 WILL DONATE TO NONINTERESTED THIRD-PARTY NONPROFIT
8 ORGANIZATIONS OR FOOD BANKS IN THE FORM OF FOOD
9 PRODUCTS AS DESCRIBED ABOVE."

10 OKAY. NOW I ASKED AT THE HEARING ON PRELIMINARY APPROVAL
11 AND DIDN'T GET A SATISFACTORY ANSWER, AND I AM NOT EVEN SURE,
12 BUT HAVING READ THE PAPERS AND HAVING REVIEWED THE PRIOR
13 HEARING, I HAVE GOTTEN THREE DIFFERENT ANSWERS.

14 AT ONE POINT I AM TOLD THAT THERE WILL BE A SUM OF MONEY
15 UP TO \$5 MILLION PAID TO -- THROUGH A CY-PRES FUND TO VARIOUS
16 CHARITIES SELECTED BY THE DEFENDANT.

17 AND, SECONDLY, I HAVE BEEN TOLD THAT THERE WILL BE FOOD
18 DONATED TO VARIOUS CHARITIES.

19 AND THEN SOMEWHERE, I DON'T KNOW IF IT WAS IN YOUR
20 SUPPLEMENTAL BRIEF OR SOMEWHERE, I AM TOLD THAT THERE COULD BE
21 FOOD AND/OR OTHER PRODUCTS, BECAUSE UNILEVER HAS CORPORATIONS
22 THAT MAKES SOAP AND ALL KINDS OF OTHER THINGS.

23 SO, I DON'T -- AS I SIT HERE TODAY, I HAVE NO IDEA WHETHER
24 OR NOT THIS ALMOST SEVEN AND A HALF MILLION DOLLARS THAT'S
25 GOING TO BE DONATED TO CHARITIES BECAUSE THERE AREN'T ENOUGH

1 CLASS MEMBERS WHO ARE INTERESTED ENOUGH TO SUBMIT CLAIMS TO
2 AMOUNT TO MORE THAN \$32,000, I HAVE NO IDEA IF IT'S GOING IN
3 THE FORM OF MONEY, IN THE FORM OF FOOD, IN THE FORM OF OTHER
4 PRODUCTS.

5 I AM VERY, VERY CONCERNED ABOUT HOW THIS SETTLEMENT LOOKS
6 TO ANYONE WHO MIGHT BE INTERESTED IN LOOKING AT THE SETTLEMENT
7 CLOSELY. IT LOOKS AS THOUGH THE ONLY, THE ONLY ONES PROFITING
8 FROM THE SETTLEMENT ARE THE PLAINTIFFS' LAWYERS AND THE
9 DEFENDANTS' PRIVATE FOUNDATION.

10 NOW, IN ADDITION, I RAISED QUESTIONS AT THE LAST HEARING
11 ABOUT THE -- HOW THIS IN KIND SORT OF DONATION WOULD WORK AS
12 WELL AS THE MONETARY COMPONENT. AND YOU ALL HAVE READ THE
13 DENNIS VERSUS KELLOGG DECISION OF THE NINTH CIRCUIT WHICH
14 RECENTLY CALLED UPON DISTRICT JUDGES TO PERFORM THEIR DUTY IN
15 REVIEWING THE CY-PRES AWARDS WITH A LOT MORE CARE THAN SOME OF
16 US HAD BEEN DOING PREVIOUSLY, AND THEY RAISE SOME OF THE SAME
17 QUESTIONS THAT I RAISE.

18 I THINK I ASKED YOU, ARE THE -- YOU OR WHOEVER WAS YOU,
19 MAYBE IT WAS YOU, OKAY, ARE THESE DONATIONS TO CHARITY IN LIEU
20 OF OTHER DONATIONS THAT THE CORPORATION WOULD NORMALLY BE
21 PROVIDING ANYWAY? WHAT THE TAX CONSEQUENCES? HAVE THOSE BEEN
22 FACTORED IN TO THE VALUE OF WHAT THIS SETTLEMENT ACTUALLY
23 AMOUNTS TO?

24 I DON'T UNDERSTAND WHAT'S CONTEMPLATED HERE. SO I NEED
25 SOME, I NEED SOME WAY OF RECONCILING ALL THESE VARIOUS

1 DIFFERENT THINGS THAT HAVE BEEN SAID ABOUT THE CY-PRES FUND.

2 WE NOW KNOW HOW MUCH WILL BE GOING TO IT. AND IT'S GOING
3 TO BE MORE THAN 74 -- \$7.4 MILLION OVER A PERIOD OF THREE
4 YEARS. IS THAT GOING TO BE MONEY? IS IT GOING TO BE FOOD?
5 IS IT GOING TO BE PRODUCTS? HOW ARE THOSE THINGS GOING TO BE
6 EVALUATED? AND TO WHOM ARE THEY GOING?

7 I THINK THAT THE DENNIS DECISION MAKES IT PRETTY CLEAR
8 THAT I GET TO DECIDE. AT LEAST I GET TO APPROVE OR
9 DISAPPROVE. IT'S -- YOU'VE ESSENTIALLY WRITTEN SORT OF THIS
10 BLANK CHECK. WE ARE GOING TO GIVE PRODUCTS, FOOD, MONEY TO
11 WHOEVER -- WHATEVER CHARITIES WE DECIDE ON. WE THINK THEY
12 SHOULD BE FOOD RELATED AS OPPOSED TO RELATED TO CONSUMER
13 PROTECTION, FALSE ADVERTISING.

14 AND CLEARLY THE NEXUS IS WRONG, AND I THINK THAT I CANNOT
15 APPROVE THIS WITHOUT MORE INFORMATION. AND I AM NOT SURE I
16 CAN APPROVE IT AT ALL. BUT IN ANY EVENT I WANT TO KNOW WHAT
17 IS CONTEMPLATED BY THE DEFENSE. I HAVE NOT BEEN GIVEN
18 SUFFICIENT INFORMATION TO EVEN BEGIN TO UNDERSTAND THIS.

19 **MS. WONGCHENKO:** YOUR HONOR, WE DON'T BELIEVE THAT
20 THIS GOES AGAINST KELLOGG. AND THE FACTS OF THIS CASE ARE
21 VERY DIFFERENT THAN THAT ONE.

22 THERE, THE COURT RULED THAT A CLAIM ABOUT SCHOOL
23 PERFORMANCE ON A CEREAL BOX WAS NOT RELATED TO FUNDING FOOD
24 BANKS. AND IN THIS CASE, WE BELIEVE THAT WE HAVE LISTED
25 CHARITIES, WE HAVE GIVEN THE CLASS MEMBERS NOTICE OF THE

1 ORGANIZATIONS THAT WILL OVERSEE THE CHARITABLE DONATIONS, AND
2 THERE IS A PROPER NEXUS. THIS IS A CASE ABOUT THE --

3 **THE COURT:** THEY HAVEN'T BEEN IDENTIFIED. HOW DO I
4 KNOW THERE IS A PROPER NEXUS?

5 **MS. WONGCHENKO:** WE HAVE IDENTIFIED THE TWO
6 FOUNDATIONS AND FIVE CHARITIES. AND WHILE THEY ARE NOT
7 EXCLUSIVE AND WE ARE NOT BOUND TO USE THOSE CHARITIES, THEY
8 STILL SHOW THE PURPOSES OF THE CHARITABLE DONATIONS THAT WE
9 HAVE IN MIND.

10 **THE COURT:** WHY IS IT THAT YOU THINK THAT YOU DON'T
11 HAVE TO IDENTIFY THE SPECIFIC CHARITIES? IT'S NOT AN
12 EXCLUSIVE LIST. YOU CAN GIVE THEM TO ANY NUMBER OF OTHER
13 CHARITIES WITHOUT COURT APPROVAL.

14 **MS. WONGCHENKO:** THE REASON, YOUR HONOR, IS SIMPLY TO
15 MAINTAIN FLEXIBILITY. CAUSES, CHANGE, SOME OF THESE CHARITIES
16 FUND DISASTER RELIEF. THESE INSTANCES CAN CHANGE OVER TIME
17 AND THERE WILL BE THREE YEARS TO ADMINISTER THE FUNDS.

18 BECAUSE OF THAT, IT MAKES SENSE THAT DEFENDANTS WOULD WANT
19 SOME TYPE OF FLEXIBILITY TO MAKE SURE THAT THE CHARITIES DO,
20 IN FACT, FIT THE PURPOSE OF THE SETTLEMENT AGREEMENT, WHICH IS
21 FOOD- AND NUTRITION-RELATED CHARITIES IN THE UNITED STATES.

22 **THE COURT:** I DON'T UNDERSTAND. HOW DO YOU COME UP
23 WITH THAT AS A NEXUS, FOOD- AND NUTRITION-RELATED CHARITIES AS
24 OPPOSED TO THE CLAIMS IN THIS CASE WHICH ARE FORE MISLABELING
25 AND FALSE ADVERTISING?

1 **MS . WONGCHENKO:** WELL, YOUR HONOR, BOTH ARE IMPORTANT
 2 TO THE CASE. PLAINTIFF ASTIANA BROUGHT THIS LAWSUIT BECAUSE
 3 SHE WAS CONCERNED ABOUT EATING UNNATURAL FOODS. THAT'S ABOUT
 4 NUTRITION. SHE'S CONCERNED ABOUT THE NUTRITIONAL VALUE OF
 5 FOOD.

6 **THE COURT:** THE CLASS DEFINITION DOESN'T INCLUDE THAT
 7 ASPECT IN THE DEFINITION. THE DEFINITION IS FOR ANYONE WHO
 8 BOUGHT BEN & JERRY'S DURING THE CLASS PERIOD. PERIOD. THERE
 9 IS NO REQUIREMENT IN THE CLASS DEFINITION THAT THE PERSON
 10 BOUGHT IT IN RELIANCE UPON THE NATURAL LABEL OR BECAUSE THEY
 11 ONLY WANTED NATURAL PRODUCTS EVEN THOUGH THEY ARE BUYING
 12 SOMETHING LIKE ICE CREAM.

13 **MS . WONGCHENKO:** THAT'S TRUE, YOUR HONOR.

14 IN ABLE TO REACH AS MANY CLASS MEMBERS AS POSSIBLE, IT
 15 WOULDN'T BE FEASIBLE TO LIMIT THE CLASS IN SUCH A WAY, BUT THE
 16 UNDERLYING LAWSUIT STILL HAD THOSE CONCERNS IN MIND. IT
 17 WASN'T -- SHE WASN'T SIMPLY CONCERNED WITH FALSE ADVERTISING
 18 WHEN SHE BROUGHT THE CASE, SHE WAS CONCERNED WITH WHAT WAS IN
 19 THE ICE CREAM THAT SHE'S EATING. WE DON'T THINK THAT KELLOGG
 20 MANDATES A CERTAIN CY-PRES CHARITY FOR EVERY SINGLE TYPE OF
 21 CASE.

22 **THE COURT:** DOESN'T KELLOGG HAVE A VERY SIMILAR
 23 ASPECT? KELLOGG WAS ALSO A FALSE ADVERTISING MISLABELING KIND
 24 OF CASE BECAUSE THEY WERE SUGGESTING THAT THEIR FROSTED
 25 MINI-FLAKES WERE NUTRITIOUS.

1 **MS. WONGCHENKO:** IT WASN'T NUTRITIOUS, IT WAS ABOUT
2 SCHOOL PERFORMANCE. AND THEY WERE SUGGESTING THAT EATING
3 CEREAL SOMEHOW INCREASED SCHOOL PERFORMANCE.

4 **THE COURT:** PRETTY MUCH THE SAME THING. THAT'S THE
5 GIST OF WHAT THEY WERE TRYING TO DO.

6 **MS. WONGCHENKO:** WE BELIEVE THERE IS A DIFFERENCE IN
7 A CLAIM ABOUT SCHOOL PERFORMANCE AND SIMPLY DONATING FOOD TO
8 FOOD BANKS.

9 IN THIS CASE WE HAVE INTEREST IN NUTRITION FROM OUR
10 PLAINTIFFS, AND THE CHARITIES ARE NOT SIMPLY FOOD BANKS, THEY
11 SERVE THE PURPOSE OF FOOD AND NUTRITION.

12 FOR INSTANCE, ONE OF OUR CHARITIES SAY THE CHILDREN HAS A
13 PROGRAM THAT EDUCATES CHILDREN ABOUT THE NUTRITIONAL VALUE OF
14 FOOD AND GIVES THEM NUTRITIONAL SNACKS. WE BELIEVE THAT THAT
15 DOES FIT THE PURPOSE OF THIS LAWSUIT AND PROVIDES A MUCH
16 BETTER Nexus THAN WAS PRESENT IN KELLOGG.

17 **THE COURT:** WHAT ABOUT THE OTHER QUESTIONS THAT WERE
18 RAISED IN THE KELLOGG?

19 FIRST OF ALL, YOU HAVEN'T ANSWERED MY QUESTION YET ABOUT
20 HOW IS THE CY-PRES FUND GOING TO BE FUNDED? WITH MONEY, FOOD,
21 OR PRODUCTS?

22 **MS. WONGCHENKO:** THE SETTLEMENT DOESN'T SPECIFY
23 DIRECTLY. AS WE DISCUSSED AT THE PRELIMINARY HEARING,
24 TYPICALLY IT IS CASH, AND WE BELIEVE THAT MOST OF THE
25 DONATIONS WILL BE CASH. IN --

1 **THE COURT:** SHOULDN'T -- DON'T I NEED TO KNOW THAT?

2 **MS. WONGCHENKO:** WELL, WE BELIEVE AS LONG AS THERE IS
3 A PROPER WAY OF VALUING THE PRODUCT DONATIONS THAT IT
4 SHOULDN'T BE A PROBLEM. I BELIEVE THAT THE COURT IN KELLOGG
5 WAS CONCERNED AS A WHOLE WITH THE LACK OF INFORMATION, NOT
6 SPECIFIC INSTANCES ON THEIR OWN OF NOT BEING ENOUGH FOR THE
7 COURT TO EVALUATE IT.

8 **THE COURT:** I DON'T HAVE ENOUGH IN ORDER TO BE ABLE
9 TO EVALUATE THE SETTLEMENT.

10 IF YOU TAKE A LOOK AT THE LANGUAGE IN KELLOGG, THE
11 SETTLEMENT NOTES THAT:

12 "KELLOGG WILL DONATE FIVE AND A HALF MILLION DOLLARS
13 WORTH OF FOOD. THE SETTLEMENT DOCUMENT GIVES NO HINT
14 AS TO HOW THE FIVE POINT MILLION WILL BE VALUED. IS
15 IT VALUED AT KELLOGG'S COST? AT WHOLESALE VALUE? AT
16 RETAIL VALUE?

17 "THE EXACT ANSWER TO THIS QUESTION HAS IMPORTANT
18 RAMIFICATIONS RELATING TO THE ACCURATE VALUATION OF
19 THE CONSTRUCTIVE COMMON FUND AND, THEREBY, THE
20 REASONABLENESS OF ATTORNEYS' FEE.

21 "KELLOGG STATED AT ORAL ARGUMENT AND IN ITS BRIEFS
22 THAT IT WILL VALUE THE FOOD DONATION AT WHOLESALE,
23 BUT THE ONLY LEGALLY ENFORCEABLE DOCUMENT, THE
24 SETTLEMENT, SAYS NOTHING OF THE SORT." NEITHER DOES
25 YOURS.

1 "ADDITIONALLY, THE SETTLEMENT FAILS TO INCLUDE ANY
2 RESTRICTIONS ON HOW KELLOGG ACCOUNTS FOR THE CY-PRES
3 DISTRIBUTION. CAN KELLOGG USE THE VALUE OF THE
4 DISTRIBUTIONS AS TAX DEDUCTIONS BECAUSE THEY WILL GO
5 TO CHARITY? AND GIVEN THAT KELLOGG ALREADY DONATES
6 BOTH FOOD AND MONEY TO CHARITIES EVERY YEAR, WHICH IS
7 UNQUESTIONABLY AN ADMIRABLE ACT, WILL THE CY-PRES
8 DISTRIBUTIONS BE IN ADDITION TO THAT WHICH KELLOGG
9 HAS ALREADY OBLIGATED ITSELF TO DONATE OR CAN KELLOGG
10 USE PREVIOUSLY BUDGETED FUNDS OR SURPLUS PRODUCTION
11 TO OFFSET ITS SETTLEMENT OBLIGATIONS?

12 "AGAIN, THE SETTLEMENT IS SILENT. WE HAVE ONLY
13 KELLOGG'S STATEMENTS AS TO ITS FUTURE INTENTIONS.
14 ALL OF THIS VAGUENESS DETRACTS FROM OUR ABILITY TO
15 DETERMINE THE TRUE VALUE OF THE CONSTRUCTIVE COMMON
16 FUND."

17 WE HAVE THE SAME PROBLEMS HERE. I WILL SIMPLY TELL YOU
18 THAT I WILL NOT APPROVE A SETTLEMENT THAT ALLOWS FOR SUCH AN
19 ENORMOUS AMOUNT OF MONEY TO BE DISTRIBUTED TO A CY-PRES FUND
20 THAT HAS NOT BEEN CLEARLY IDENTIFIED TO THE COURT AND ONE IN
21 WHICH THESE QUESTIONS ARE NOT ANSWERED.

22 I RAISED SOME OF THESE QUESTIONS WITH YOU, NOT REALLY
23 COMPREHENDING WHAT YOU WERE INTENDING AT THE TIME OF THE
24 MOTION FOR PRELIMINARY APPROVAL, AND I DIDN'T GET SATISFACTORY
25 ANSWERS AT THAT TIME. AND I CERTAINLY EXPECTED TO GET MORE

1 SPECIFICITY NOW. BUT NOW YOU CAN'T EVEN TELL ME IF IT'S GOING
2 TO BE MONEY, FOOD, OR PRODUCTS. I HAVE NO WAY TO EVALUATE
3 THIS SETTLEMENT. NONE WHATSOEVER.

4 I AM NOT PREPARED TO APPROVE THIS AT ALL. AND THERE HAVE
5 BEEN ARGUMENTS MADE AS TO THE SEVERABILITY OF THE CY-PRES
6 FUND. WELL, I THINK THE KELLOGG DECISION MAKES IT PRETTY
7 CLEAR WE CAN'T DO THAT. MOREOVER, IN YOUR SUPPLEMENTAL BRIEF,
8 YOU INDICATED THAT YOU WOULD OBJECT TO SEVERING THE CY-PRES
9 PROVISION OF THE SETTLEMENT AND APPROVING THE REST.

10 FRANKLY, WHAT'S THERE TO APPROVE? IF THE CY-PRES
11 PROVISION CANNOT BE APPROVED TODAY, WHAT IS THERE TO APPROVE
12 OTHER THAN THAT THE 5,466 PEOPLE WILL GET \$6 EACH?

13 **MS. WONGCHENKO:** YOUR HONOR, WE DON'T BELIEVE THAT
14 KELLOGG MANDATES THAT EACH OF THOSE THINGS IS ACTUALLY PRESENT
15 IN THE SETTLEMENT AGREEMENT.

16 IF READING THE OPINION AS A WHOLE, THE PRIMARY CONCERN WAS
17 THAT NO CHARITIES AT ALL WERE IDENTIFIED. AND WITHOUT THAT IT
18 SAID THAT IT COULDN'T TAKE ANY --

19 **THE COURT:** WHETHER OR NOT, IN YOUR VIEW, IT MANDATES
20 IT OR NOT, I TOLD YOU THAT I AM NOT PREPARED TO APPROVE THIS
21 SETTLEMENT WITHOUT THAT KIND OF INFORMATION.

22 **MS. WONGCHENKO:** YES.

23 **THE COURT:** I MEAN, EVEN BEFORE KELLOGG, I ASKED
24 SIMILAR QUESTIONS AND DID NOT GET ANSWERS. YOU DIDN'T PROVIDE
25 THE ANSWERS IN YOUR BRIEFING, AND I AM NOT GOING TO APPROVE.

1 I AM NOT GOING TO APPROVE THE SETTLEMENT WITHOUT A LOT MORE
2 SPECIFICITY, PARTICULARLY GIVEN HOW LOPSIDED IT IS.

3 I MEAN, I UNDERSTAND THAT YOU ALL WANT IT OVER. YOU'VE
4 ENGAGED IN YOUR MEDIATION. YOU'VE ARRIVED AT A NUMBER THAT
5 EVERYONE IS HAPPY WITH. YOU'VE ARRIVED AT A PROCEDURE.
6 THERE'S NO BENEFIT TO THE CLASS AT ALL.

7 AND BEFORE I AM GOING TO APPROVE SOMETHING THAT ALLOWS THE
8 DEFENDANT TO ESSENTIALLY FUNNEL THIS HUGE AMOUNT OF MONEY BACK
9 INTO ITS OWN CHOSEN CHARITIES AND ITS OWN FOUNDATION, EVEN
10 THOUGH AGREEING TO PAY THE DEFENDANTS' (SIC) ATTORNEYS A HUGE
11 AMOUNT OF MONEY OVER AND ABOVE THE 7.5 MILLION, I JUST -- I
12 FIND IT UNCONSCIONABLE AT THIS JUNCTURE. I NEED TO KNOW A LOT
13 MORE ABOUT THIS BEFORE I AM GOING TO BE WILLING TO APPROVE IT.

14 **MR. BRAUN:** YOUR HONOR, IF I MAY.

15 YOUR SENTIMENTS ARE VERY CLEAR TO US, BUT WHAT I WOULD
16 LIKE TO FIND OUT FROM THE COURT IS IN ADDITION TO WHAT YOU'VE
17 DISCUSSED WITH US, THE OTHER ISSUES THAT YOU MIGHT HAVE SO
18 THAT IF WE GO BACK AND TRY TO DO SOMETHING THAT IS MORE
19 ADEQUATE IN THE COURT'S EYES, THAT WE DO A PROPER AND THOROUGH
20 JOB AND NOT FACE A NEW LIST OF ISSUES IF IT'S POSSIBLE TO
21 AVOID IT.

22 **THE COURT:** WELL, THERE ARE TWO MAIN PROBLEMS. THE
23 MAIN ONE BEING WITH THE CY-PRES FUND.

24 THERE IS SOME QUESTION AS TO THE NOTICE ISSUE. I MEAN,
25 THE OBJECTORS RAISED THE OBJECTION THAT THE NOTICE WAS

1 INADEQUATE AND THE CLAIMS PROCEDURE WAS DIFFICULT. AND MAYBE
2 THAT IS WHY THERE ARE SO FEW CLAIMS MADE HERE. I THINK IT IS
3 JUST AS LIKELY PEOPLE JUST AREN'T INTERESTED IN SPENDING THE
4 TIME TO PUT A STAMP AND SENDING IN A CLAIM WHEN THE MOST THEY
5 ARE ABLE TO GET IS \$6.

6 I DON'T, FRANKLY, KNOW WHY THERE IS A REQUIREMENT FOR
7 PROOF OF CLAIM FOR THE \$20 AS OPPOSED TO THE \$6, PARTICULARLY
8 GIVEN THE AMOUNT, THIS PIDDLING AMOUNT OF MONEY THAT'S GOING
9 TO THE CLASS COMPARED TO THE ATTORNEYS AND BACK TO THE
10 DEFENDANTS' CORPORATION OR FOUNDATION. I DON'T UNDERSTAND
11 THAT.

12 I AM NOT SURE WHAT BETTER NOTICE YOU COULD GIVE SINCE MOST
13 PEOPLE BUY A PINT OF BEN & JERRY'S, EAT IT AND THROW AWAY THE
14 CONTAINER. I CAN'T IMAGINE ANYBODY SAVES THEIR RECEIPTS OR
15 THE EMPTY CONTAINERS WITHOUT KNOWING THAT THERE'S A LAWSUIT.

16 I, FRANKLY, DON'T UNDERSTAND WHY YOU LIMITED IT. IF YOU
17 ARE GOING TO LIMIT IT TO \$2, IT MAKES SENSE THAT THAT'S THE
18 PAYOUT BECAUSE THAT'S MORE THAN A HUNDRED PERCENT OF THE
19 WHOLESALE COST AND 60 PERCENT OF THE RETAIL COST. THAT MAKES
20 SENSE, BUT WHY DO YOU LIMIT IT TO THREE CONTAINERS?

21 THE CLASS PERIOD WAS WHAT, FOUR, FIVE YEARS, CORRECT? I
22 MEAN, IF PEOPLE ARE GOING TO BUY BEN & JERRY'S, YOU THINK -- I
23 DON'T EVEN EAT ICE CREAM VERY MUCH, BUT I HAVE CERTAINLY
24 BOUGHT MORE THAN THREE CONTAINERS IN FIVE YEARS. BUT YOU ARE
25 LIMITING THE CLASS TO THREE CONTAINERS OVER THIS SUBSTANTIAL

1 PERIOD OF TIME? WHY? WHY IS IT LIMITED TO THAT, TO THAT
2 EXTENT? THE NUMBERS ARE ARBITRARY.

3 YOU ARGUE THAT -- IN YOUR PAPERS, PLAINTIFFS ARGUE THAT
4 THIS IS SUCH A GOOD SETTLEMENT AND IT SHOULD BE APPROVED
5 BECAUSE THE CLASS IS GETTING A HUNDRED PERCENT, CLOSE TO A
6 HUNDRED PERCENT OF WHAT IT COULD GET IF IT PROCEEDED TO TRIAL.

7 I DON'T UNDERSTAND HOW YOU COME UP WITH THAT. LIKE I
8 SAID, I THINK THAT PEOPLE ARE JUST AS LIKELY TO HAVE BOUGHT
9 MORE THAN THREE CONTAINERS OVER A FIVE-YEAR PERIOD. YOUR
10 CLIENT DID. YOUR CLIENT, THE NAMED PLAINTIFFS BOUGHT MORE
11 THAN THREE CONTAINERS OVER THE CLASS PERIOD. WHY AREN'T THE
12 ABSENT CLASS MEMBERS SIMILARLY SITUATED?

13 SO, I HAVE A LOT OF PROBLEMS WITH IT. I HAVE A LOT OF
14 PROBLEMS WITH THE SETTLEMENT.

15 SO, I DO HAVE A PROBLEM WITH YOUR PLAN OF ALLOCATION,
16 PARTICULARLY NOW THAT I HAVE SEEN HOW MANY PEOPLE ARE LIKELY
17 TO RESPOND.

18 THE NOTICE PROVISION I DON'T, FRANKLY, KNOW HOW YOU CAN
19 IMPROVE ON THE NOTICE UNLESS -- I DON'T KNOW HOW YOU CAN
20 IMPROVE ON THAT. YOU PUBLISHED IT. I AM NOT IN THE CLASS
21 ACTION PLAINTIFFS' LAWYERS' BUSINESS, SO I DON'T REALLY KNOW
22 WHAT OTHER OPTIONS YOU THINK ARE APPROPRIATE FOR THIS KIND OF
23 A CONSUMER CLASS ACTION. BUT I DON'T LIKE THE PLAN OF
24 ALLOCATION.

25 AND I WON'T APPROVE A SITUATION WHERE THE DEFENDANT

1 ESSENTIALLY HAS CARTE BLANCHE TO PAY IN WHATEVER WAY IT WISHES
2 TO WHOMEVER IT WISHES WITHOUT PRIOR COURT APPROVAL.

3 AND WITH REGARD TO THE REQUEST FOR ATTORNEYS' FEES AND
4 COSTS, EVEN THOUGH IT IS PAID NOT FROM THE FUND, IT DOESN'T
5 DILUTE THE FUND, I STILL NEED TO KNOW WHY IT WOULD BE
6 APPROPRIATE TO APPLY A MULTIPLIER IN THIS CASE. FOR THE
7 CLASS -- PAYING PLAINTIFFS' ATTORNEYS 1.6 MULTIPLIER IN A CASE
8 WHERE THE CLASS IS GETTING \$32,000 OUT OF A \$7.5 MILLION
9 SETTLEMENT JUST SMACKS ME AS BEING TOTALLY INAPPROPRIATE.

10 I HAVE ONLY GENERALLY APPROVED MULTIPLIERS IN SITUATIONS
11 WHERE THE CLASS RECEIVED A SUBSTANTIAL, IF NOT ALL OF THEIR
12 LOSSES. I AM NOT PERSUADED THAT \$6 REPRESENTS ANYTHING CLOSE
13 TO SUBSTANTIALLY ALL OF THE LOSSES OF THESE ABSENT CLASS
14 MEMBERS.

15 SO, THOSE ARE MY PROBLEMS. OKAY? THE MOTION IS DENIED.
16 YOU CAN GO AWAY AND RENEGOTIATE OR WE CAN PROCEED TO TRIAL.
17 BUT UNLESS YOU ADDRESS THESE CONCERNS, I AM NOT GOING TO
18 APPROVE THIS.

19 **MS. WONGCHENKO:** THANK YOU, YOUR HONOR.

20 **MR. BRAUN:** THANK YOU FOR YOUR TIME, YOUR HONOR.

21 **THE COURT:** OKAY.

22 (PROCEEDINGS CONCLUDED AT 11:15 A.M.)

CERTIFICATE OF REPORTER

I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

Diane E. Skillman

DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

FRIDAY, SEPTEMBER 21, 2012